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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE,

Plaintiff and Respondent,

v.

ALEJANDRO MATA,

Defendant and Appellant.

B231823

(Los Angeles County
Super. Ct. No. VA102902)

APPEAL from a judgment of the Superior Court of Los Angeles County. Robert J. Higa, Judge. Affirmed as modified.

Donna L. Harris, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Stacy S. Schwartz and Michael C. Keller, Deputy Attorneys General, for Plaintiff and Respondent.

Alejandro Mata appeals from the judgment entered after a jury convicted him of first degree murder, with two attendant special circumstances, five counts of attempted murder, active participation in a criminal street gang and related weapons offenses, all connected to three shooting incidents in 2007. Mata contends that the judgment should be reversed because the admission of his custodial statements violated his constitutional rights under *Miranda v. Arizona* (1966) 384 U.S. 436 (*Miranda*) and that the People did not present a showing of due diligence in locating a witness, Nicholas Landeros, to support admission of his preliminary hearing testimony. Mata also contends that the evidence is insufficient to support his conviction for active participation in a criminal street gang and the jury's true finding on the criminal street gang enhancement in relation to one of the attempted murder counts and that his sentence on another of the attempted murder counts is unauthorized. We agree with Mata that his sentence on one of the attempted murder counts is unauthorized and modify the judgment accordingly. As modified, we affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

1. *The Information*

A 13-count information, dated November 13, 2008, charged Mata with:

- (1) the murder of Denise Regalado (Pen. Code, § 187, subd. (a))¹ (count 1);
- (2) the willful, deliberate and premeditated attempted murders of Christian Luna, Jesus Gonzalez, Nicholas Landeros and Salvador Hernandez (§§ 664, 187, subd. (a)) (counts 2, 3, 4 and 7);
- (3) possession of an assault weapon (former § 12280, subd. (b)) (counts 5 and 9);
- (4) unlawful firearm activity based on possession of a rifle in violation of an express condition of probation (former § 12021, subd. (d)(1)) (counts 6, 10 and 12);
- (5) shooting at an inhabited dwelling (§ 246) (count 8);
- (6) active participation in a criminal street gang (§ 186.22, subd. (a)(1)) (count 11); and
- (7) the attempted murder of Hector Ruiz, Jr. (§ 664, 187, subd. (a)(1)) (count 13).

On count 1, the information alleged the special circumstances that the murder was intentional and perpetrated by

¹ Statutory references are to the Penal Code unless otherwise noted.

means of discharging a firearm from a motor vehicle (§ 190.2, subd. (a)(21)), and that Mata intentionally killed the victim while an active participant in a criminal street gang (*id.* at subd. (a)(22)). The information specially alleged: (1) on all counts except count 11, commission of the offenses for the benefit of, at the direction of, or in association with a criminal street gang (§ 186.22, subd. (b)); (2) on counts 1 through 4, firearm enhancements pursuant to section 12022.55, subdivision (a), and section 12022.53, subdivisions (b) to (d); (3) on count 7, firearm enhancements pursuant to section 12022.53, subdivisions (b) to (d); (4) on count 8, a firearm enhancement pursuant to section 12022.5, subdivision (a); and (5) on count 13, personal infliction of great bodily injury (§ 12022.7, subd. (a)).

2. *The Evidence Presented at Trial*

a. *The January 26, 2007 shooting*

On the afternoon of January 26, 2007, Salvador Hernandez, who was associated with a clique of the Florencia 13 criminal street gang, was walking on Middleton Street in Huntington Park with his uncle, Jesus Gonzalez, toward Hernandez's home. Hernandez lived in one of several residences at 6149 Middleton Street, and Gonzalez lived nearby. As they approached Hernandez's home, a car stopped near them. A man exited the passenger side of the car. Hernandez started running, fearing the man might have a gun, and Gonzalez followed. As he was running, Hernandez heard gunshots and was struck multiple times, sustaining gunshot wounds to his arm, back and knee. As a result of his injuries, he was hospitalized for four days and unable to walk for more than a month.

At trial, Hernandez said that he did not see the face of the man who had shot him and that he had never seen Mata before coming to court. He could not remember whether he had told detectives that he knew the shooter as "Risky." Huntington Park Police Department Officer Gabriel Alpizar, however, testified that, on October 11, 2007, he had interviewed Hernandez, who expressed concern about being a "rat," but identified Mata from a photographic lineup as the shooter during the January 26, 2007 incident and said he knew him as "Risky" and had been feuding with "Risky" for several years. Gonzalez

testified that he was not with Hernandez when the shots were fired, and thus did not see the shooter, but rather came out of Hernandez's house after hearing gunshots.

Gonzalez denied telling police detectives that the shooter was "Risk" or "Risky" from the Cyclones 13 gang and identifying Mata as the shooter from a photographic lineup, although he acknowledged that he had placed his initials on the lineup document.

Officer Alpizar testified that, during an interview with Gonzalez on October 16, 2007, Gonzalez said that he was with Hernandez when the gunshots were fired, identified Mata as the shooter from a photographic lineup and said he knew him as "Risk" or "Risky."

b. The June 3, 2007 shooting

About 10:30 p.m. on June 3, 2007, Gonzalez, Nicholas Landeros, Christian Luna and Denise Regalado were talking in the driveway outside 6149 Middleton Street. Landeros is Gonzalez's cousin and lived in one of the houses that shared the Middleton Street address. A white Honda sedan approached with the passenger side of the car nearest the group and the windows open. Although Gonzalez could not see who was in the vehicle, he observed flashes coming from inside the car and heard five to 10 gunshots. Gonzalez, who carried a gun for protection, fired six shots at the car as it drove away.

Hernandez, who had been asleep in the house, came outside when he heard gunshots. Regalado and Gonzalez had been shot and were on the ground. Regalado, who sustained three gunshot wounds, died. Gonzalez suffered gunshot wounds to the groin, lower back and right leg, where the bullet entered his calf and ruptured an artery. Gonzalez was hospitalized for two weeks, had a plastic tube inserted in his artery and at trial still wore a compression wrap on his leg. Landeros sustained a gunshot wound to his right leg above the knee cap. Luna suffered a gunshot wound on his right hand. An expended bullet and several expended bullet casings were found at the scene, and two bullets were recovered from Regalado during an autopsy.

c. The October 6, 2007 shooting and Mata's arrest

On October 6, 2007, about 5:00 p.m., Hector Ruiz and a friend were walking on Florence Avenue in Huntington Park. Two men walked by going the opposite direction. One was cursing loudly. Ruiz turned to look at the man, who said ““fuck the fags,”” which was a derogatory term for the Florencia 13 gang. Although Ruiz was not affiliated with the gang, the man pulled out a gun. As Ruiz ran away, he heard a gunshot and felt pain in his leg. A witness to the incident saw that the shooter, whom he identified as Mata after Mata was apprehended and at the preliminary hearing, was wearing a Lakers jersey and called 911. At trial, that witness did not identify Mata as the shooter and testified that he did not recall identifying Mata as the shooter at the preliminary hearing.

Ruiz sustained a gunshot wound to his leg. He was hospitalized for one day and used crutches for a month. At the scene of the shooting, Ruiz said the shooter looked like a gang member and was wearing a sports jersey. He later selected two photographs from a lineup, one of which was a picture of Mata, and said both men resembled the shooter.

Officer Conrad Chacon found a nine-millimeter casing from the scene of the shooting. Another officer detained Mata nearby. Mata held a Lakers jersey in his hand and possessed five, nine-millimeter bullets. The officer also found a loaded nine-millimeter handgun under a street sweeper parked close to the location where Mata had been apprehended. Mata was arrested. Testing determined that the gun was the one used to shoot Ruiz.

At trial, Ruiz testified he had been drunk on October 6, 2007 and he could not remember anything that happened on that date. He also did not remember circling two photographs from a lineup, one of which depicted Mata, and stating that they resembled the shooter. Although he had a scar on his leg caused by a gunshot wound, he did not remember being shot or sustaining a bullet wound to his leg.

d. The October 8, 2007 search of Mata's residence

In a search of Mata's residence executed pursuant to a warrant, officers found in Mata's bedroom an expended cartridge, two expended shotgun shells and an empty box of ammunition. In his room they also saw graffiti for the Cyclones 13, Mata's gang, as well as graffiti stating "fuck all the fags," the Cyclones 13 manner of referring to Florencia 13. The graffiti and several papers in the bedroom contained Mata's moniker of "Risk" or "Risky."

Officers also found a rifle, magazines for the rifle and ammunition in a backyard shed. Expert testimony established that the rifle was an assault weapon because it had been modified to use a detachable magazine. Expert testimony also established the rifle was the weapon used to kill Regalado.

e. The October 9, 2007 custodial interrogation of Mata

On October 9, 2007, Officer Alpizar and another officer conducted a custodial interrogation of Mata. Mata, 19 years old at the time, admitted that he had been a Cyclones 13 gang member since the age of 13 and that his moniker was "Risk" or "Risky." He had a Cyclones 13 tattoo on his leg. He also acknowledged a rivalry between his gang and the Florencia 13 gang, telling the officers that members of Florencia 13 had shot at him, and said that he hated Hernandez, who was affiliated with Florencia 13. When asked why he had been arrested, Mata said because "I shot another dude." Mata stated that before the October 6 shooting he had used methamphetamine, felt paranoid and believed Ruiz was "dogging" him. Mata admitted shooting Ruiz and attempting to discard the gun. Although Mata initially denied involvement in the June 3 shooting, he later stated that he took the rifle with him that night intending to kill Hernandez and fired eight shots at the group of people in the driveway after shouting the name of his gang.

f. The criminal street gang expert witness's opinion

Officer Chacon testified as an expert on the Cyclones 13 criminal street gang, stating that the gang's primary activities include robbery, grand theft of automobiles,

shootings and burglaries. Officer Chacon opined that Mata was a member of the Cyclones 13, based on his tattoos, the gang graffiti found at his house and his admissions during his custodial interview. According to Officer Chacon, Cyclones 13 and Florencia 13 were rival gangs in a territorial dispute, which included Middleton Street where Hernandez lived. The officer believed Hernandez to be a member of a clique of the Florencia 13 gang. Given a hypothetical based on the prosecution's case regarding the shootings on January 26, June 3, and October 6, Officer Chacon opined that all three were committed for the benefit of the Cyclones 13.

3. *The Jury's Verdict and Sentencing*

The jury found Mata guilty on all counts except shooting at an inhabited dwelling as charged in count 8, possession of an assault weapon as charged in count 9 and unlawful firearm activity as charged in count 10. On the guilty counts, the jury found true the special circumstances related to the murder in count 1 and all attendant firearm use and criminal street gang allegations. The trial court sentenced Mata to a state prison term of life without the possibility of parole, plus 225 years, consisting of (1) life without the possibility of parole, plus 25 years to life for the firearm enhancement under section 12022.53, subdivision (d), for the murder in count 1; and (2) 15 years to life, plus 25 years to life for the firearm enhancement under section 12022.53, subdivision (d), for the attempted murders in each of counts 2, 3, 4, 7 and 13, all to be served consecutively to count 1 and to each other. The court stayed execution of sentence on the additional firearm and criminal street gang enhancements. It imposed concurrent terms on count 5 for possession of an assault weapon, counts 6 and 12 for unlawful firearm activity and count 11 for active participation in a criminal street gang.

DISCUSSION

1. *Admission of Mata's Custodial Statements Did Not Violate His Constitutional Rights*

In *Miranda v. Arizona* (1966) 384 U.S. 436 (*Miranda*), the United States Supreme Court established procedural safeguards to protect a person's right against self-incrimination protected by the Fifth Amendment to the United States Constitution, as applied to the states through the due process clause of the Fourteenth Amendment. An individual subjected to a custodial police interrogation "must be warned prior to any questioning that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires. Opportunity to exercise these rights must be afforded to him throughout the interrogation. After such warnings have been given, and such opportunity afforded him, the individual may knowingly and intelligently waive these rights and agree to answer questions or make a statement." (*Id.* at p. 479.)

A valid waiver must be "voluntary, knowing, and intelligent." [Citation.] A valid waiver of *Miranda* rights depends upon the 'totality of the circumstances including the background, experience, and conduct of defendant.' [Citation.] [¶] There is a presumption against waiver. [Citation.] The prosecution bears the burden of proving by a preponderance of the evidence that a defendant knowingly and intelligently waived his *Miranda* rights. [Citation.] To satisfy this burden, the prosecution must introduce sufficient evidence to establish that under the 'totality of the circumstances,' the defendant was aware of 'the nature of the right being abandoned and the consequences of the decision to abandon it.' [Citation.] The government's burden to make such a showing 'is great,' and the court will 'indulge every reasonable presumption against waiver of fundamental constitutional rights.' [Citation.]" (*United States v. Garibay* (9th Cir. 1998) 143 F.3d 534, 536-537; see also *People v. Bradford* (1997) 14 Cal.4th 1005, 1034 ["state must demonstrate the validity of defendant's waiver by a preponderance of the evidence"].)

In reviewing a challenge that “a statement or confession is inadmissible because it was obtained in violation of a defendant’s rights under [*Miranda*, the reviewing court] accept[s] the trial court’s resolution of disputed facts and inferences, and its evaluation of credibility, if supported by substantial evidence. [Citation.] Although [it] independently determine[s] whether, from the undisputed facts and those properly found by the trial court, the challenged statements were illegally obtained [citation], [it] “‘give[s] great weight to the considered conclusions” of a lower court that has previously reviewed the same evidence.’ [Citations.]” (*People v. Wash* (1993) 6 Cal.4th 215, 235-236.)

Mata contends the admission of his custodial statements violated his *Miranda* rights because he did not expressly waive them. But “[a]n express statement of waiver is not required” (*People v. Medina* (1995) 11 Cal.4th 694, 752.) A waiver may be found “where the evidence shows that the police have stated the four-pronged *Miranda* warning without offering to immediately secure counsel, that they asked the defendant if he understands those rights, that the defendant has responded affirmatively, and that the defendant without expressly stating that he has waived counsel proceeds to make damaging statements. [Citations.]” (*People v. Johnson* (1969) 70 Cal.2d 541, 556, overruled on other grounds in *People v. DeVaughn* (1977) 18 Cal.3d 889, 899, fn. 8.) Although “‘the attendant facts must show clearly and convincingly that [the defendant] did relinquish his constitutional rights knowingly, intelligently, and voluntarily, . . . a statement by the defendant to that effect is not an essential link in the chain of proof” (*Id.* at p. 558.) Here, as the transcript of Mata’s interrogation shows, the investigating officers informed Mata of each of his constitutional rights and, after stating each right, asked Mata if he understood. Mata replied yes each time. He then proceeded to answer the officers’ questions. These circumstances demonstrate a waiver of *Miranda* rights.

Mata next maintains that his waiver cannot be determined voluntary, knowing and intelligent because he was only 19 years old at the time of the interrogation and the officers used false statements regarding the strength of the evidence against him to prompt him to reveal damaging information. He, however, cites no authority for the

contention that a 19 year old cannot voluntarily waive his rights, and we know of none. On the contrary, even with respect to a juvenile, no ““particular age of minority is a proper basis to assume lack of understanding, incompetency, or other inability to voluntarily waive the right to remain silent under some presumption that the *Miranda* explanation was not understood.” [Citation.]” (*People v. Lewis* (2001) 26 Cal.4th 334, 384 [defendant less than 14 years old voluntarily, knowingly and intelligently waived *Miranda* rights when he “participated in his conversations with detectives” and “expressed no confusion either before or during the interview”].) Indeed, although only 19 years old Mata already had at least one recent prior experience with police interrogation during which he had been advised of his *Miranda* rights. During the instant questioning, in addition to reading Mata his *Miranda* rights, the officers told him that he possessed the same rights that they had explained to him at the prior interrogation. Nor do the officers’ alleged false statements regarding the evidence they had against Mata serve as a basis to find his waiver was not voluntary, knowing and intelligent. “[T]he fact that the police made misrepresentations does not necessarily render an otherwise voluntary confession inadmissible.” [Citations.]” (*People v. Johnson* (2010) 183 Cal.App.4th 253, 295.) Mata spoke freely with the officers, answered their questions and never requested an attorney or an end to the interrogation.

Mata also argues that his waiver was not voluntary, knowing and intelligent because he was under the influence of methamphetamine at the time of the interrogation. At the hearing on his motion to suppress his custodial statements, Mata testified that he had started using “crystal meth” in the week before his arrest on October 6 and had not been sleeping. Mata possessed crystal methamphetamine when arrested, but the officers did not find it during the search of his person because he had hidden it in his rectum. He reported going to the bathroom and using the drug while at the jail some time before his interrogation. Although Mata’s custodial interrogation took place on October 9, three days after his arrest, Mata said that he still felt the effects of the drug during the interrogation. Nevertheless, he admitted that he understood the officers’ questions regarding where he lived, his gang affiliation, his animosity toward Hernandez, the

rivalry between his gang and Hernandez's and the reason he shot and tried to kill Hernandez. Mata also admitted that he was emotional and cried when the officers told him that a woman had died as a result of his firing shots on June 3.

After hearing Mata's testimony and reviewing portions of the transcript and watching parts of the tape of the interrogation, the trial court concluded, "I don't know how people act and answer questions when they are under the influence of crystal meth, I've never experienced that but I imagine . . . different people react differently. . . . Mata seems to answer, understand and answer all the questions without any hesitation and seemed to clearly understand what [the officers] are asking him and his answers were relevant to the questions that were asked. . . . Mata in answering the questions from the witness stand here, he looked like he had the same demeanor in the tapes that I was just viewing, so based upon that I would conclude that and I find that he was not under the influence to the extent that he did not know or understand the questions intelligently that were asked of him." The court's inferences are supported by the record. Indeed, the Supreme Court "has repeatedly rejected claims of incapacity or incompetence to waive *Miranda* rights premised upon voluntary intoxication or ingestion of drugs, where, as in this case, there is nothing in the record to indicate that the defendant did not understand his rights and the questions posed to him. [Citation.]" (*People v. Clark* (1993) 5 Cal.4th 950, 988, overruled on other grounds in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22; see also *People v. Jackson* (1989) 49 Cal.3d 1170, 1189.) The totality of the circumstances demonstrates a voluntary, knowing and intelligent waiver of *Miranda* rights.

2. *The People Exercised Due Diligence in Attempting to Locate Landeros to Testify at Trial and Thus Admission of His Prior Testimony Was Not Error*

During trial, the People announced that they had been unable to locate Landeros to testify as a witness at trial and, as a result, sought to admit his preliminary hearing testimony. Over defense objection, the trial court admitted the prior testimony. Mata contends the People's efforts to locate Landeros were not adequate and thus admission of the prior testimony constitutes reversible error as to counts 1 through 7

(counts 1 through 6 related to the June 3 shooting at which Landeros was present and count 7 was the January 26 attempted murder of Hernandez). We disagree.

“““The confrontation clauses of both the federal and state Constitutions guarantee a criminal defendant the right to confront the prosecution’s witnesses. (U.S. Const., 6th Amend.; Cal. Const. art. I, § 15.) That right is not absolute, however. An exception exists when a witness is unavailable and, at a previous court proceeding against the same defendant, has given testimony that was subject to cross-examination. Under federal constitutional law, such testimony is admissible if the prosecution shows it made ‘a good-faith effort’ to obtain the presence of the witness at trial.” [Citations.] [¶] . . . “In California, the exception to the confrontation right for prior recorded testimony is codified in [Evidence Code] section 1291, subdivision (a), which provides: ‘Evidence of former testimony is not made inadmissible by the hearsay rule if the declarant is unavailable as a witness and: [¶] . . . [¶] (2) The party against whom the former testimony is offered was a party to the action or proceeding in which the testimony was given and had the right and opportunity to cross-examine the declarant with an interest and motive similar to that which he has at the hearing.’ A witness is unavailable if ‘[a]bsent from the hearing and the proponent of his or her statement has exercised reasonable diligence but has been unable to procure his or her attendance by the court’s process.’ ([Evid. Code,] § 240, subd. (a)(5).) Although section 240 refers to ‘reasonable diligence,’ [the Supreme Court] has often described the evaluation as one involving ‘due diligence.’ [Citation.]’ [Citation.]” (*People v. Fuiava* (2012) 53 Cal.4th 622, 674-675.) According to the Supreme Court, “the term “due diligence” is “incapable of a mechanical definition,” but it “connotes persevering application, untiring efforts in good earnest, efforts of a substantial character.” [Citations.] Relevant considerations include “whether the search was timely begun” [citation], the importance of the witness’s testimony [citation], and whether leads were completely explored [citation].’ [Citation.] ‘When . . . the facts are undisputed, a reviewing court decides the question of due diligence independently, not deferentially. [Citation.]’ [Citation.]” (*Id.* at p. 675.)

Landeros testified at the preliminary hearing, despite expressing to Officer Alpizar an unwillingness to “go to court.” After the preliminary hearing, Officer Alpizar tried to find Landeros, by searching “different databases” and attempting to serve him at his last known address, in connection with the previously scheduled May 10, 2010 and January 19, 2011 trial dates, but was unsuccessful. On February 9, 2011, James Day, an investigator from the District Attorney’s Office, began looking for Landeros in advance of the February 16, 2011 trial date—eight days before the first witness’s testimony. Day looked for Landeros at 6149 Middleton Street, which a Department of Vehicles search showed as his address. The man present at that address said he had not seen Landeros in more than two years. Day also learned that Landeros’s aunt lived in a “back house” on the property. He contacted the aunt, who said that she had not seen Landeros in “quite a while.” Day checked databases at the hospital at the University of Southern California and the Employment Development Department, as well as records from the coroner’s office and custodial records, but did not locate Landeros. He checked with telephone information but was unable to find an address for Landeros. Day called several different telephone numbers potentially linked to Landeros that he had discovered through his research, but did not find Landeros. A man answered at one of the numbers and told Day that he would have Landeros return the call, but Landeros never did. Day tried the number another time and yet again was unable to reach Landeros. Through a check of credit resources, Day found an address linked to Landeros on Loma Vista Avenue in Bell. On February 16, 2011, an officer went to that address to locate and serve Landeros with a subpoena. A female resident told the officer that Landeros had moved in November 2010 and that she had no information as to his whereabouts. Another officer made a second attempt at the same address on February 17, 2011, but also was unsuccessful in locating Landeros.

Based on these undisputed facts, evaluated in light of the nature of Landeros’s preliminary hearing testimony compared to the other evidence at trial, the People exercised due diligence in attempting to locate Landeros for trial. After the preliminary hearing, efforts were made to locate Landeros in connection with the two previously

scheduled trial dates. More than a week before the People called their first witness and 13 days before they sought to introduce Landeros's preliminary hearing testimony, the People made additional and substantial efforts to secure his presence at trial. (See *People v. Fuiava*, *supra*, 53 Cal.4th at pp. 675-676 [reasonable to begin search for witness approximately two weeks before the date set for the start of trial].) Landeros's testimony, while helpful, was by no means the linchpin of the People's case against Mata. At the preliminary hearing, Landeros did not identify Mata as the shooter on June 3 and stated that he had selected Mata's photograph from a lineup because he recognized him, not because Mata was the shooter, testimony that was corroborated by Officer Alpizar. Further, other much stronger evidence supported Mata's guilt. Mata admitted during his custodial interrogation that he had fired shots on June 3 into the group of people that included Landeros. Ballistics evidence tied the rifle found at Mata's residence to the June 3 shooting. And, although Mata connects the admission of Landeros's preliminary hearing testimony to the attempted murder of Hernandez, Landeros did not provide any information regarding that crime. Landeros's preliminary hearing testimony, therefore, was not critical to the convictions. (*Id.* at p. 676 ["reasonableness of [prosecution's] activities is supported by the circumstance that [the witness's] testimony was not of critical importance in the trial"].)

Mata nevertheless claims that the People's efforts were inadequate because they did not attempt to keep in touch with Landeros after the preliminary hearing, even though they knew he did not want to testify. Although Landeros expressed that he did not want to come to court, that was true of many of the witnesses in this case, and Landeros appeared at the preliminary hearing and testified. As noted by the Supreme Court, "[w]e could not properly impose upon the People an obligation to keep 'periodic tabs' on every material witness in a criminal case, for the administrative burdens of doing so would be prohibitive. Moreover, it is unclear what effective and reasonable controls the People could impose upon a witness who plans to leave the state, or simply 'disappear,' long before a trial date is set." [Citation.] (*People v. Fuiava*, *supra*, 53 Cal.4th at p. 676.) In any case, because the People tried to locate Landeros before trial in

connection with two previously scheduled trial dates, Mata's contention that the People did nothing after the preliminary hearing to attempt to ensure Landeros's presence as a witness until shortly before trial lacks merit.

Mata also asserts that the People's efforts were inadequate because they did not ask Hernandez, who is Landeros's cousin and was present with Landeros on the night of the June 3 shooting, about Landeros's whereabouts. Given the scope of the search undertaken and the nature of Landeros's preliminary hearing testimony, the failure to try to find Landeros through Hernandez does not undermine the conclusion that the People exercised due diligence. "[T]he circumstance that 'additional efforts might have been made or other lines of inquiry pursued does not affect [the due diligence] conclusion. [Citation.] It is enough that the People used reasonable efforts to locate the witness.' [Citations.]" (*People v. Fuiava, supra*, 53 Cal.4th at p. 677, citing *Hardy v. Cross* (2011) 565 U.S. ___, ___, 132 S.Ct. 490, 495 ["when a witness disappears before trial, it is always possible to think of additional steps that the prosecution might have taken to secure the witness'[s] presence . . . , but the Sixth Amendment does not require the prosecution to exhaust every avenue of inquiry, no matter how unpromising"].)

Mata's reliance on *People v. Cromer* (2001) 24 Cal.4th 889 also does not demonstrate the People's efforts to locate Landeros were inadequate. In that case, the Supreme Court determined the People had not exercised due diligence in attempting to find a witness—the victim of one of the charged robberies—because “serious efforts to locate [her] were unreasonably delayed, and investigation of promising information was unreasonably curtailed.” (*Id.* at p. 904.) Although the witness had identified the defendant as her assailant at the preliminary hearing, the People made no efforts to locate her for the originally scheduled trial date, despite receiving a report of her disappearance. (*Ibid.*) Even when, once trial was underway, they received promising information that the witness was living with her mother, they waited two days before checking out the information. (*Ibid.*) After the investigator eventually visited the home of the witness's mother and learned that the mother would return the next day, “the investigator never bothered to return to speak to [the witness's] mother, the person most likely to know

where [the witness] was.” (*Ibid.*) Such circumstances simply are not present in this case where the People made reasonable attempts to locate Landeros, a helpful but not critical witness, before every scheduled trial date.

3. *Substantial Evidence Supports Mata’s Conviction for Active Participation in a Criminal Street Gang*

Mata contends the evidence is insufficient to support his conviction on count 11 under section 186.22, subdivision (a), for active participation in a criminal street gang. We disagree.

Under section 186.22, subdivision (a), “[a]ny person who actively participates in any criminal street gang with knowledge that its members engage in or have engaged in a pattern of criminal gang activity, and who willfully promotes, furthers, or assists in any felonious criminal conduct by members of that gang, shall be punished by imprisonment in a county jail for a period not to exceed one year, or by imprisonment in the state prison for 16 months, or two or three years.” “The gravamen of the substantive offense set forth in section 186.22[, subdivision] (a)[,] is active participation in a criminal street gang.” (*People v. Albillar* (2010) 51 Cal.4th 47, 55.) “[T]he elements of the gang offense are (1) active participation in a criminal street gang, in the sense of participation that is more than nominal or passive; (2) knowledge that the gang’s members engage in or have engaged in a pattern of criminal gang activity; and (3) the willful promotion, furtherance, or assistance in any felonious criminal conduct by members of that gang. [Citation.] All three elements can be satisfied without proof the felonious criminal conduct promoted, furthered, or assisted was gang related.” (*Id.* at p. 56.)

According to Mata, his conviction on count 11 must be reversed because he acted alone, without aiding and abetting any members of his gang, in committing a felony and he sought “to further his own agenda [based on his dislike for Hernandez] and not to promote or further criminal conduct by other gang members.” Contrary to Mata’s contention, however, section 186.22, subdivision (a), does not require joint action by gang members—a member acting as the direct perpetrator is sufficient if the other criteria are met. (*People v. Sanchez* (2009) 179 Cal.App.4th 1297, 1307-1308 [direct perpetrator,

who does not assist fellow gang members, can be convicted under § 186.22, subd. (a)(1)]; see also *People v. Salcido* (2007) 149 Cal.App.4th 356, 367-368; *People v. Ngoun* (2001) 88 Cal.App.4th 432, 436-437.)² Mata's claim that he acted to further his own agenda, and did not promote, further or assist in any felonious criminal conduct by members of his gang, is not persuasive. Although the evidence plainly demonstrates that longstanding animosity existed between Mata and Hernandez, the charged offenses took place on three separate occasions over nine months, and Hernandez was present on only one occasion. Mata was an admitted member of the Cyclones 13 gang and aware of his gang's rivalry with the Florencia 13 gang. Mata admitted that on June 3 he shouted the name of his gang before firing approximately eight shots into a group of individuals that did not include Hernandez. And the October 6 shooting, when Mata made a derogatory reference to the Florencia 13 gang before shooting Ruiz, had no connection to Hernandez. This evidence supports the jury's conclusion that Mata intended to promote, further or assist in any criminal conduct by gang members and did not act simply based on his personal dislike of Hernandez.

4. *Substantial Evidence Supports the Criminal Street Gang Allegation as to Count 7*

Count 7 charged Mata with the attempted willful, deliberate and premeditated murder of Hernandez and included a special allegation that the offense was committed for the benefit of, at the direction of and in association with a criminal street gang such that Mata was subject to sentencing under section 186.22, subdivision (b)(4). Mata contends that the People did not present sufficient evidence to establish a pattern of criminal gang activity to support the jury's true finding on the criminal street gang allegation. We disagree.

² The issue whether an active participant in a criminal street gang may be found guilty of violating section 186.22, subdivision (a), when, acting entirely alone, he commits a felony, and there is no other evidence indicating the crime had anything to do with the gang, is currently pending in the Supreme Court. (*People v. Rodriguez*, review granted Oct. 28, 2010, S187680.)

To establish a “pattern of criminal gang activity” to support a criminal street gang allegation under section 186.22, the People must prove “the commission of, attempted commission of, conspiracy to commit, or solicitation of, sustained juvenile petition for, or conviction of two or more of the following offenses, provided at least one of these offenses occurred after the effective date of this chapter and the last of those offenses occurred within three years after a prior offense, and the offenses were committed on separate occasions, or by two or more persons[.]” (§ 186.22, subd. (e).) Predicate offenses include unlawful homicide, or the attempt thereof, and carrying a loaded firearm in violation of former section 12031. (*Id.* at subd. (e)(3) & (33).) The predicate offenses may be proved by evidence of the charged offense and one prior offense. (*People v. Tran* (2011) 51 Cal.4th 1040, 1046; *People v. Gardeley* (1996) 14 Cal.4th 605, 625.) The prior offense may consist of a crime that the defendant committed on a separate occasion. (*Tran*, at pp. 1044, 1046-1050.) A crime committed after the charged offense, however, cannot serve as a predicate offense. (*People v. Duran* (2002) 97 Cal.App.4th 1448, 1458.)

Mata correctly points out that the People’s evidence that on May 5, 2008 Carlos Camacho, a documented member of the Cyclones 13 gang, pleaded no contest to an attempted robbery on February 26, 2008, cannot serve as a predicate offense for the attempted murder in count 7 because it occurred after the charged offense. The People, however, presented other evidence to establish a pattern of criminal gang activity based on the requisite two predicate offenses for the criminal street gang allegation. Evidence of the charged offense of attempted murder, a qualifying offense under section 186.22, subdivision (e)(3), can serve as one predicate offense. The People also presented evidence that Mata committed another crime on a separate occasion, that being, on February 21, 2007, Mata pleaded no contest to a charge that he carried a loaded firearm in violation of former section 12031 on September 16, 2006, a qualifying offense under

section 186.22, subd. (e)(33). These two offenses support the jury's true finding on the criminal street gang allegation as to count 7.³

5. *The Sentence Imposed for the Attempted Murder on Count 13 Is Unauthorized*

On count 13 for the attempted murder of Ruiz, the trial court imposed, pursuant to section 186.22, subdivision (b)(5), a state prison term of life, with a minimum parole eligibility date of 15 years, plus 25 years to life under section 12022.53, subdivision (d) for the firearm enhancement. Unlike the other four attempted murder counts, count 13 did not include an allegation that the attempted murder was willful, deliberate and premeditated. The court, therefore, was not authorized to impose a life sentence on that count. Rather, it was required to select a state prison term of five, seven or nine years (§ 664) and then add 10 years for the criminal street gang enhancement under section 186.22, subdivision (b)(1)(C), and 25 years to life for the firearm enhancement under section 12022.53, subdivision (d). Because the court imposed midterm sentences on all other determinate counts of which Mata was convicted, we conclude that his sentence on count 13 should consist of the midterm of seven years, plus 10 years for the criminal street gang enhancement under section 186.22, subdivision (b)(1)(C), and 25 years to life for the firearm enhancement under section 12022.53, subdivision (d). (See *People v. Alford* (2010) 180 Cal.App.4th 1463, 1473 [modifying judgment including unauthorized sentence rather than remanding for resentencing when trial court undoubtedly would have imposed the midterm]; *People v. Flores* (1987) 193 Cal.App.3d 915, 922 [modifying judgment including

³ Mata argues that substantial evidence does not support the criminal street gang allegation as to count 7 only, even though the information charged a criminal street gang allegation as to all counts except count 11, and the jury found that allegation true as to all counts (except counts 8, 9 and 10 on which it found Mata not guilty). Although the Camacho offense occurred after all of the charged offenses in this case, the People established the requisite two predicate offenses as to the relevant counts based on evidence of the charged offense and Mata's prior no contest plea to carrying a loaded firearm in violation of former section 12031.

unauthorized sentence rather than remanding for resentencing when imposition of correct sentence would not substantially affect the total prison term].)

DISPOSITION

The judgment is modified to reflect that Mata's sentence on count 13 is seven years, plus 10 years for the criminal street gang enhancement under section 186.22, subdivision (b)(1)(C), and 25 years to life for the firearm use enhancement under section 12022.53, subdivision (d). As modified, the judgment is affirmed. The trial court is directed to forward a copy of the corrected abstract of judgment to the Department of Corrections and Rehabilitation.

NOT TO BE PUBLISHED.

ROTHSCHILD, J.

We concur:

MALLANO, P. J.

CHANEY, J.